

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

JOE E. THOMAS

V.

**MARK T. ESPER, SECRETARY OF
THE ARMY**

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No. 5:18CV110-RWS-CMC

**ORDER ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

The above-entitled and numbered civil action was heretofore referred to United States Magistrate Judge Caroline M. Craven pursuant to 28 U.S.C. § 636. On May 22, 2019, the Magistrate Judge issued a Report and Recommendation, recommending Defendant Secretary of the Army's Motion to Dismiss, or in the Alternative, for Summary Judgment (Docket No. 13) be granted and Plaintiff's above-entitled and numbered cause of action be dismissed without prejudice. No objections to the Report and Recommendation have been filed.¹

The Court has carefully reviewed the Report and Recommendation and agrees with the Magistrate Judge that Plaintiff has not met his burden to demonstrate that he timely exhausted his administrative remedies within 45 days of his April 17, 2013 termination. As held by the Magistrate Judge, Plaintiff failed to properly exhaust his administrative remedies when he failed to initiate contact and request informal counseling from an agency EEO counselor within 45 days of the last act of discrimination about which he complains. Plaintiff's failure to timely exhaust his administrative remedies pursuant to 29 C.F.R. § 1614.105(a)(1) consequently bars him from bringing this suit. Plaintiff has presented no plausible argument that would excuse his failure to comply with the 45-day pre-complaint processing requirement of § 1614.105(a)(1).

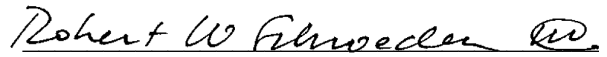
¹ On May 29, 2019, Plaintiff acknowledged receipt of the Report and Recommendation.

The Court hereby **ADOPTS** the Report of the United States Magistrate Judge as the findings and conclusions of this Court. The Court finds Plaintiff's Title VII claims should be **DISMISSED** as he has failed to state a claim on which relief may be granted.² Accordingly, it is hereby

ORDERED that Defendant Secretary of the Army's Motion to Dismiss, or in the Alternative, for Summary Judgment (Docket No. 13) is **GRANTED**. It is further

ORDERED that Plaintiff's above-entitled and numbered cause of action is **DISMISSED WITHOUT PREJUDICE**.

So ORDERED and SIGNED this 10th day of July, 2019.


ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

² Generally, dismissals under Rule 12(b)(6) are on the merits and should be with prejudice. *Csorba v. Varo, Inc.*, 58 F.3d 636, 636 (5th Cir.1995) (per curiam) (citing *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir.1977)). However, "[w]hen a district court dismisses a claim under Rule 12(b)(6) for failure to exhaust administrative remedies, the dismissal is without prejudice to the claimant's right to return to court after it has exhausted its administrative remedies." *King v. Life Sch.*, 809 F. Supp. 2d 572, 582 (N.D. Tex. 2011) (citing *Martin K. Eby Const. Co., Inc. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 n.5 (5th Cir.2004) and *Crawford v. Tex. Army Nat'l Guard*, 794 F.2d 1034, 1035, 1037 (5th Cir.1986)).